

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	
Notice of Proposed Rulemaking)	
)	CS Docket No. 02-52
Appropriate Regulatory Treatment for)	
Broadband Access to the Internet Over)	
Cable Facilities)	
_____)	

COMMENTS OF THE CITY OF PHILADELPHIA

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COMMENTS OF THE CITY OF PHILADELPHIA

The City of Philadelphia, Pennsylvania (the “City”) files these Comments in response to the Declaratory Ruling and Notice of Proposed Rulemaking released by the Federal Communications Commission (the “Commission”) in the above referenced proceeding on March 15, 2002 (the “Declaratory Ruling”).

SUMMARY

The City disagrees with the Commission’s determination in the Declaratory Ruling that cable modem service is properly classified as an “interstate information service,” both on the merits of the Commission’s interpretation of the Communications Act of 1934, as amended; and because the effect of the classification, if the tentative conclusions of the Declaratory Ruling become final conclusions, will be to preempt impermissibly the ability of local governments to regulate and manage the public rights-of-way and to receive reasonable compensation for the use of this valuable public resource.

The Commission tentatively concludes that cable operators should not be required to obtain any authorization other than the cable franchise in order to offer cable modem service, and that cable modem service, as an “information service,” is not subject to regulation under the cable franchise and Title VI. The result could be to strip localities of all ability to manage an increasingly significant right-of-way use if the Commission does not act to preserve local authority. We contend that such an outcome of this proceeding is impermissible and contrary to law. Unless prohibited by state law, local governments have the authority manage their rights-of-way by licensing use of the ROW to provide non-cable services, and that authority is entirely independent of any classification as “information service” or “cable service.” And Title VI itself recognizes local and state authority to regulate non-cable services provided over a cable system. The Commission’s tentative position evidently is based on the erroneous view that cable modem service does not burden right-of-way use – when in fact, the massive upgrades required by the industry to meet the technological conditions for broadband services,

including the cable modem platform, have brought extensive new incursions into the rights-of-way and attendant burdens on the local governments charged with managing these incursions.

The Commission's tentative conclusion that local governments may not collect a franchise fee on cable modem service has the same disabling effect, depriving local governments of the fiscal means of managing the rights-of-way, while giving the industry free – and effectively unregulated – use of our single most valuable public resource. This result destroys the balance between industry interests and the interests of our citizens and taxpayers that Congress and the federal courts have sought to maintain for all telecommunications providers that depend on use of the rights-of-way to install and operate their networks. It also destroys the bargain many local franchising authorities made with their cable operators in negotiating franchise agreements that apply the fee to cable modem service. Finally, the Declaratory Ruling strongly suggests the Commission intends to preempt local authority to enforce customer service standards for the cable modem platform, leaving cable modem consumers defenseless against an industry that is not generally known for solicitous attention to customer problems – or even for answering the phone on time. For the reasons stated in detail below, the City urges the Commission to preserve the legitimate and traditional authority of local governments to manage and receive reasonable compensation for use of the public rights-of-way to provide cable modem service; and to protect the interests of cable modem consumers.

I. CABLE MODEM SERVICE IS A “CABLE SERVICE” AND SHOULD BE REGULATED AS A “CABLE SERVICE”

The City of Philadelphia disagrees with the Commission's determination in the Declaratory Ruling that cable modem service is properly classified as an “interstate information service” and not as a “cable service” under the Communications Act of 1934, 47 U.S.C. § 153, as amended. The strong arguments against the result reached by the Commission have been ably stated in the comments of other local governments and their representatives filed in this proceeding, including the Comments of the Alliance of Local Organizations Against Preemption and the Comments of the City Coalition, with which the City agrees. We will not repeat those arguments here, but respectfully observe that

the serious issues and concerns stated in these Comments all arise from the Commission's ill-advised use of a service classification to sharply curtail, if not preempt altogether, the long-standing authority of local governments to regulate the use of the public rights-of-way and the activities of the cable operators who are major users of the rights-of-way.

II. HOWEVER CABLE MODEM SERVICE IS CLASSIFIED, LOCAL GOVERNMENTS MUST BE ABLE TO REGULATE, AND REQUIRE REASONABLE COMPENSATION FOR, THE USE OF THE PUBLIC RIGHTS-OF-WAY TO DELIVER THE SERVICE.

The City is concerned that the Commission may reach conclusions in this proceeding that could effectively deprive local governments of the ability to recover reasonable compensation for cable operators' use of the public rights-of-way ("ROW") to provide what we believe will soon be a dominant element of their service offerings. Any such result could effectively disable local government authority to regulate construction in and use of the ROW, as well as our ability to recover the costs incurred by our taxpayers to manage and restore the ROW under the impact of network construction and use that is in substantial part intended to support Internet access services over the cable modem platform. Moreover, for the reasons described below, we believe such a result would be contrary to Title VI of the Communications Act and beyond the Commission's regulatory authority.

The Declaratory Ruling itself raises our concern by its tentative conclusion that "[o]nce a cable operator has obtained a franchise for [a cable] system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service." Declaratory Ruling at ¶ 102. The implication is that cable modem service can have no impact on the ROW and should therefore not be subject to local regulatory authority. We respectfully suggest the Commission's tentative conclusion ignores the obvious facts that most cable systems in the country have had to undergo extensive upgrades to permit them to carry broadband services, of which cable modem service is a leading instance – indeed, the premier instance, if the marketing strategies of the operators are any indication. These upgrades, in Philadelphia and

elsewhere, have involved the installation of many, many hundreds of miles of fiber optic cable in and over the ROW in order to replace the older tree-and-branch network architecture with ring and star architectures, the construction of new hub sites, expanded headends (in many cases requiring new towers to support the satellite and micro-wave transmissions used to power the new broadband services), and the replacement of equipment literally throughout every cable network – much of it in the ROW.

The Declaratory Ruling actually notes these facts in some detail (*see id.* at ¶ 12), but only in order to suggest that deregulation of cable modem service is somehow required in order to persuade the operators to continue their investment in the new broadband infrastructure. We ask the Commission to recognize the other side of the issue – the impact on the ROW and the citizens who must live with these system reconstructions, and the considerable cost of their impact on the ROW and management of the ROW. The City applauds and has consistently supported its cable franchisees for their investment in system upgrades, but a balance must be found that recognizes the legitimate regulatory interest of the local governments as well as the economic needs of the industry.

This balance is not achieved by removing cable modem service from local regulation as a cable service, then abolishing, as the Commission appears poised to do, all local authority to regulate the cable operator's use of the ROW for broadband services like cable modem service. Yet that could be the effect if the Commission adopts its further tentative conclusion that no separate franchise or other permission can be required of a cable operator as a condition of its providing cable modem service. Declaratory Ruling at ¶ 102. The City urges the Commission to reject these tentative conclusions and adopt a balanced approach to regulation of the cable modem platform that preserves the legitimate authority of the local governments over their rights-of-way.¹

We contend, moreover, that any other result is contrary to Title VI and outside the Commission's authority. Unless prohibited by state law, local governments have the authority to manage their rights-of-way by licensing use of the ROW to provide non-

¹The Commission states that its concern is “unnecessary regulation at the local level that extends beyond local government interests in managing the public rights-of-way,” *Declaratory Ruling* at ¶ 104. Taken together, however, the Commission's tentative conclusions could have the effect, as noted, of eliminating local regulatory authority altogether.

cable services, and that authority is entirely independent of any classification as “information service” or “cable service.” And Title VI itself recognizes local and state authority to regulate non-cable services provided over a cable system. The arguments for these propositions are well stated in the Comments filed in this proceeding by the Alliance of Local Organizations Against Preemption (the “Alliance”). The City agrees with and supports the Alliance’s position that the Commission may not preempt local authority to regulate the rights-of-way, including use of the ROW to provide non-cable services. Preemption would be an extraordinary and extreme result not warranted by the legitimate business and commercial interests of the cable industry.

III. LOCAL GOVERNMENTS ARE ENTITLED TO COLLECT FEES ON REVENUES FROM CABLE MODEM SERVICE.

The Commission concludes that gross revenues from cable modem service are not subject to franchise fees if it is not classified as a cable service, Declaratory Ruling at ¶ 105, and then “tentatively concludes” that Title VI of the Communications Act does not provide an “independent basis” of authority for collecting fees on this service. If local governments are also precluded from requiring separate franchises for cable modem service, the intended result would appear to be a bar on any form of compensation for use of the ROW to provide this service.

It is important to understand that the fee issue implicates ROW management, as well as franchise fee revenues. If the local franchising authority cannot recover the franchise fee for a major use of the cable system, and is also precluded by the Commission from otherwise franchising or licensing the service, then as a practical matter, its ability to regulate the manner in which the operator occupies and uses the ROW, including construction in and over the ROW, is effectively crippled. We cannot manage the activities of ROW users if we cannot pay our inspectors and managers – however imperative the regulation is to protect the health and safety of our citizens.

In the Telecommunications Act of 1996 (the “1996 Act”), Congress expressly preserved the local governments’ authority to manage the rights-of-way and to require fair and reasonable compensation for use of the ROW to provide telecommunications services. The federal courts have extended this principle to the Cable Act, holding that

franchise fees are not a tax, but are payments made to municipalities by cable providers for their use of the rights-of-way. *See City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). The 1996 Act and the *Dallas* decision enforce a balance between the interest of the industry in maximizing its profits and the two-fold interest of local governments in deriving reasonable compensation for the use of a valuable public resource, and in protecting public safety by regulating the manner in which the industry uses the ROW. The Commission now appears ready to undo that balance. However cable modem service is classified for regulatory purposes, the City urges the Commission to preserve the balance of public interests and industry interests by finding in this proceeding that cable modem service, like cable service and telecommunications service, remains subject to compensation for ROW use and also subject to the regulatory powers local governments have traditionally exercised over the ROW. For reasons articulated in the Alliance's Comments, any other result will impermissibly override the authority of local governments to regulate the ROW and receive reasonable compensation for its use. Many local governments, Philadelphia included, bargained in good faith with their franchisees for gross revenue definitions that include cable modem service, and relied on the expectation of collecting this component of the fee in making concessions to the operators. The Commission now proposes to preempt these contractual arrangements. The fiscal impact will be considerable. Although our cable franchisees now decline to provide information on cable modem revenues, claiming that after the Declaratory Ruling we haven't the right even to ask, our most recent information for three of the City's four franchise areas indicates an increase of more than four hundred per cent in cable modem revenues in one area in the year 2001 and an increase of nearly four hundred percent in two other areas. We anticipate, as the industry anticipates, that the trend will not only continue, but accelerate, and that broadband video services over the cable modem platform will quickly become a dominant element of the revenue base, in Philadelphia and elsewhere. We urge the Commission to preserve the terms of existing franchise agreements that provide for collection of the franchise fee on cable modem service.

IV. THE COMMISSION SHOULD NOT ATTEMPT TO PREEMPT LOCAL GOVERNMENT ABILITY TO PROTECT THE CONSUMERS OF CABLE MODEM SERVICE.

The Commission requests comment on how a classification of cable modem service as an interstate information service affects franchising issues. However the service is classified, the City urges the Commission to preserve local government authority over customer service and consumer protection issues related to cable modem service. The City's recent experience has been particularly troublesome in this connection. Following a franchisee's roll-out of cable modem service, with other digital services, earlier this year, the City received a multitude of complaints about slow response time for customer problems and the level of customer service resources available for dealing with the new services. Under its franchise agreements, the City has strong remedies for the failure of cable operators to comply with customer service standards. Although the Commission states no tentative conclusion regarding this issue, the implication is that if cable modem service is not a cable service, then local governments cannot enforce either the Commission's customer service standards or the provisions in their franchise agreements that govern service issues. In other words, we will be precluded from enforcing the franchise agreements as to cable modem service and service quality will be wholly unregulated – unless the Commission elects to preserve local authority in this area by its rulemaking.²

As in the case of franchise fees, the City, like most local franchising authorities, bargained for and secured substantial protection for cable consumers in its franchise contracts. The Commission appears ready to deprive us of the benefit of that bargain, at the expense of our citizens who are consumers of cable modem service. We urge the Commission to preserve the authority we have under the Cable Act and our franchise agreements to protect the rights and legitimate interests of consumers of cable modem service.

²If local governments lose their responsibility and authority for dealing with such matters, aggrieved consumers will be forced to address their complaints to the Commission, which is less accessible to them, and has less knowledge of local conditions, than municipal authorities, and which does not have the resources to deal effectively with the large volume of local consumer complaints.

CONCLUSION

For the reasons stated above, the City of Philadelphia respectfully requests that the Commission act in this proceeding to affirm the regulatory authority of local governments over the rights-of-way, including their use to provide cable modem service; our authority to recover reasonable compensation for use of the ROW to provide cable modem service; and our authority to enforce service standards on behalf of consumers of cable modem services.

Dated: June 17, 2002

Respectfully submitted,
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